Supreme Court
FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1993

ROBERT J. MUSEMECHE,

Petitioner,

v.

CHARTER NATIONAL BANK-WESTHEIMER,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court misconstrued and misapplied applicable decisions of this Court when it upheld the Texas suspension statute [which indefinitely suspends the running of an applicable statute of limitations while a citizen is absent from the state of Texas] against Equal Protection scrutiny because no rational basis exists for its application today.

2. Whether the Texas suspension statute violates a citizens' fundamental right to move freely from state to state; or to receive equal privileges and immunities as protected by the Fourteenth Amendment and Article IV, Section 2 of the United States Constitution.

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OPINIONS BELOW

The Memorandum and Order of the United States District Court for the Southern District of Texas entered on February 3, 1993 is reprinted in the Appendix at pages A1-A5.

The Final Judgment of the United States District Court for the Southern District of Texas entered on February 10, 1993 is reprinted in the Appendix at pages B1-B2.

The Judgment Order of the United States Court of Appeals for the Fifth Circuit on appeal from the United States District Court for the Southern District of Texas entered February 3, 1994 is reprinted in the Appendix at page C1.

The Judgment Order of the United States Court of Appeals for the Fifth Circuit on Petition for Rehearing entered March 3, 1994 is reprinted in the Appendix at page D1.

JURISDICTION

Jurisdiction of this Honorable Court is invoked under 28 U.S.C § 1254(1). The Judgment Order of the Court of Appeals for the Fifth Circuit, which affirmed the Final Judgment of the District Court for the Southern District of Texas, was entered on February 3, 1994. Petitioner's Petition for Rehearing in the Court of Appeals for the Fifth Circuit was denied and entered on March 3, 1994.

STATUTES INVOLVED

Article IV, Section 2, United States Constitution:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

* * *

Amendment XIV, Section 1, United States Constitution:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tex. Civ. Prac. & Rem. Code Ann. § 16.004 (Vernon 1986)[1]

Tex. Civ. Prac. & Rem. Code Ann. § 16.063 (Vernon 1986):

> "TEMPORARY ABSENCE FROM STATE" The absence from this state of a person against whom a cause of action may be maintained suspends the run-

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[1] The full text of this statute is set out verbatim in Appendix E.

ning of the applicable statute of limitations for the period of the person's absence.

Tex. R. Civ. P. 108 (Vernon 1986)[2]

STATEMENT OF THE CASE

The important Constitutional issues in this case do not involve questions of disputed fact. In 1982, the Petitioner, while domiciled in Texas, executed a written guarantee agreement in favor of Respondent which purported to secure payment of one half of all sums owed under one certain promissory note executed by Mr. Louis Marichal.[3]

The Marichal debt was extended and renewed several times, and finally matured by its express terms on May 28, 1985. Marichal was in default of his obligations as maker of the note on such date, and the Respondent was compelled under Texas law to bring suit on the note and the guarantee agreement within four years of the day of the default, or May 28, 1989. Tex. Civ. Prac. & Rem. Code Ann. § 16.004 (Vernon 1986).

However, it is stipulated by the parties that Respondent failed to file this lawsuit until October 9, 1989, beyond the applicable limitations period for suit on a debt.

It is further stipulated by the parties that in July of 1986, during the running of the four year limitations period, the Petitioner departed the State of Texas with the intent to forfeit his Texas domicile and establish a domicile of indefinite duration in the State of Washington. At the time, the general economy in Texas, especially the real estate industry, was severely depressed. Without significant commercial and residential construction, the Petitioner's skills and training as an

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[2] The full text of this statute is set out verbatim in Appendix F.

[3] Louis Marichal was originally a named defendant and served with citation in this lawsuit. However, the Respondent dismissed Marichal after confirmation that the Marichal debt had been discharged in bankruptcy by Marichal prior to the filing of this lawsuit.

architect were not in demand. Thus, Petitioner chose to relocate to the northwest region of the United States where labor was in demand and opportunities for gainful employment seemed feasible. There is no dispute that the Respondent knew of the Petitioner's residence in Washington, since service of citation on Petitioner was obtained on October 23, 1989 by certified mail to his home in Seattle.

Because the Respondent's cause of action was filed after the limitations period had expired, the Petitioner sought dismissal of this suit as a matter of law. In response to Petitioner's limitations defense, Respondent's only argument was that Petitioner had been absent from Texas following the default on the note, and that such absence tolled the running of the limitations period pursuant to a Texas suspension statute, Tex. Civ. Prac. & Rem. Code Ann. § 16.063 (Vernon 1986).

The District Court found the suspension statute to be valid in the face of Petitioner's Constitutional challenges. The case proceeded to trial and the District Court entered judgment for the Respondent in the approximate sum of six hundred sixty thousand ($660,000.00) dollars. Without opinion, the Fifth Circuit affirmed.

Basis for Federal Jurisdiction Below

The District Court's jurisdiction was based upon 28 U.S.C. §1332 upon the dismissal by the Plaintiff-Respondent of Defendant Louis Marichal, a Texas resident.

REASONS FOR GRANTING THE WRIT

There is no dispute that had Petitioner maintained residence in Texas rather than relocate to Washington during the four year limitations period, the Respondent's cause of action in this case would be barred as a matter of law. Tex. Civ. Prac. & Rem. Code Ann. § 16.004 (Vernon 1986). However, the Texas suspension statute at issue in this case, Tex. Civ. Prac. &

Rem. Code Ann. §16.063 (Vernon 1986), has the effect of indefinitely tolling the limitations period of nonresidents, and permits the Respondent to revive its stale claim.

The administration of justice by a State where the sole determinant factor is intentional discrimination based upon state citizenship, impacts important Constitutional principles, and deserves this Court's attention. Further, the District Court's stated rationale for upholding the suspension statute misconstrues, and is in conflict with this Court's ruling in *Bendix Autolite Corp. v. Midwesco Enter. Inc.*, 486 U.S. 888 (1988).

I. THE DISTRICT COURT MISCONSTRUED APPLICABLE DECISIONS OF THIS COURT WHEN IT UPHELD THE TEXAS SUSPENSION STATUTE AGAINST EQUAL PROTECTION SCRUTINY BECAUSE NO RATIONAL BASIS EXISTS FOR ITS APPLICATION TODAY.

The historical purpose for the suspension statute was the protection of domestic creditors from loss occasioned by debtors who were absent from the state and therefore unamenable to jurisdiction and process until their return. *Ayres v. Henderson*, 9 Tex. 539, 541 (1853); *Teal v. Ayres*, 9 Tex. 590, 593 (1853); *Gibson v. Nadel*, 164 F.2d 970 (5th Cir. 1947). The issue was one of *in personam* jurisdiction. Unless the defendant were to be found within the territory of the state and served with proper process, no state court had jurisdiction to render a personal judgment against a nonresident. *Pennoyer v. Neff*, 95 U.S. 714 (1877); *accord York v. State*, 73 Tex. 651, 11 S.W. 869 (1889).

In *Henderson*, the court noted it was to a creditor's advantage that their debtors remain within the limits of the State, and that the intended purpose of the suspension provision was to "protect them from the inconvenience and loss to which they would be exposed by the absence of their debtors and *consequent immunity of the latter from process and judgment.*" *Henderson*, 9 Tex. 539 at 541 (emphasis added).

Today, these jurisdictional considerations are not relevant in the light of the minimum contacts doctrine established by this Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). *See also Hanson v. Denckla*, 357 U.S. 235 (1958); *U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760 (Tex. 1977). *International Shoe* and its progeny have made the suspension statute unnecessary because the return of the defendant to the state is no longer a condition precedent to the state's exercise of *in personam* jurisdiction.

Thus, the suspension statute is void as moot, and under the facts of the case at bar, application of the statute not only denies Petitioner equal protection of the laws, but also conflicts with precedent of this Court for two significant reasons.

First, the statute has as its stated purpose the effect of indefinitely tolling the limitations period of nonresidents only. Thus, the statute openly discriminates against a class of persons who change domicile from Texas with the intent to never re-establish such Texas domicile. Only resident defendants are granted the benefits of an applicable statute of limitations defense. However, in light of *International Shoe* and its progeny, combined with the service mechanisms upon nonresident defendants provided by Tex. R. Civ. P. 108, no peculiar evil is diminished by the State's discriminatory action to indefinitely toll claims against nonresidents. Because *in personam* jurisdiction and service of citation is obtained by Texas plaintiffs over nonresident and resident defendants alike under Rule 108, it can not be shown that such discrimination serves any rational basis.

Second, the District Court erred when it reasoned that Equal Protection considerations regarding the suspension statute have been resolved against Petitioner by *stare decisis*. The District Court's reliance upon the Texas Supreme Court in the case of *Vaughn v. Deitz*, 430 S.W.2d 487 (Tex. 1968), and this Court's decision in *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982) is misplaced. The *Vaughn* case is inapplicable, because

it predates the amendment to Tex. R. Civ. P. 108, and the District Court misapplied this Court's ruling in *G.D. Searle & Co.*

In *Vaughn*, the suspension statute was used to toll a limitations period against nonresidents involved in an automobile collision in Texas. The *Vaughn* Court found that a rational basis existed in 1968 to discriminate against such class because service of process on the Secretary of State under the existing long arm statute did not enable the Plaintiff to obtain a personal judgment against the nonresident, and reasoned that it was more difficult for a plaintiff to ascertain and provide the Secretary of State the defendants' address for process by registered mail. *Vaughn*, 430 S.W.2d at 490.

However, as argued above, the rules regarding service of process upon a nonresident defendant were changed by the Texas Supreme Court after Vaughn with an amendment in 1975 to Rule 108 of the Texas Rules of Civil Procedure. The effect of the amendment to the issue of equal protection was not before the Texas supreme court when the constitutional issue was decided in *Vaughn*.

Further, no citation to authority is necessary to argue that the inconvenience occasioned in one's aquisition of a nonresident defendant's address has dramatically declined in the twenty-five years since *Vaughn* due to the explosion of technology gained through the present information revolution. At the time the *Vaughn* Court analyzed a rational basis for discrimination in 1968, no one yet knew the extent to which the arrival of high powered computers, cellular telephones, fax machines and photocopiers would have in the transformation or our society. There is no dispute that Respondent was able to gain Petitioner's address through its knowledge of the Petitioner's social security number and utilization of national credit reporting databanks. The rational basis for discrimination against nonresident defendants in *Vaughn* does not exist to discriminate against nonresidents today.

Further, the District Court erred when it reasoned that this Court's decision in *G.D. Searle & Co.* is analogous to the facts in the instant case. In *G.D. Searle & Co.*, this Court found no equal protection violation because the New Jersey suspension statute at issue in that case was rationally based upon the statutory differences of service on nonresidents. 455 U.S. at 410. However, unlike the facts in *G.D. Searle & Co.*, service upon nonresidents of Texas is effectuated in the exact same manner as service upon Texas residents. Tex. R. Civ. P. 108 (Vernon 1986).

More important, the District Court's stated rational and application of *G.D. Searle & Co.* to the instant case is in conflict with this Court's later analysis of a similar suspension statute which was struck down in *Bendix Autolite*, where this Court held in pertinent part:

> "*The Ohio statute before us might have been held to be a discrimination that invalidates without extended inquiry*. We choose, however, to assess the interests of the State, to demonstrate that its legitimate sphere of regulation is not much advanced by the statute while interstate commerce is subject to substantial restraints. We find that the burden imposed on interstate commerce by the tolling statute exceeds any local interest that the State might advance."

486 U.S. 888 at 891 (emphasis added).

II. THE TEXAS SUSPENSION STATUTE VIOLATES A CITIZENS' FUNDAMENTAL RIGHT TO MOVE FREELY FROM STATE TO STATE; OR TO RECEIVE EQUAL PRIVILEGES AND IMMUNITIES AS PROTECTED BY THE FOURTEENTH AMENDMENT AND ARTICLE IV, SECTION 2 OF THE UNITED STATES CONSTITUTION.

Application of the suspension statute permits Texas to openly discriminate against a class of persons based upon whether one's residency is within or outside the state. Those persons who are residents of Texas are permitted a legal privilege to bar litigation filed beyond a certain period of time: those persons who are not residents of Texas are denied this legal defense. Petitioner argues the application of such practice places upon nonresidents a burden so heavy and so unnecessary as to be unreasonable and oppressive in violation of the Privileges and Immunities Clauses of the Fourteenth Amendment and Article IV, Section 2 of the United States Constitution.

The application of the Privileges and Immunities Clause to particular discriminatory action against nonresidents involves a two-step analysis: does the statute burden a protected privilege and immunity protected by the Clause; and if so, does it bear upon the "vitality of the Nation as a single entity [to require] the State treat all citizens, resident and nonresident, equally." *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 383 (1978).

Under this two-step inquiry, the Texas suspension statute fails to pass Constitutional scrutiny for two significant reasons. First, the statute precludes Petitioner and others the fundamental right of migration in the pursuit of livelihood and the search of opportunity. *Cornfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230); *Truax v. Raich*, 239 U.S. 33, 38 (1915). The ability of a Texas plaintiff to delay *ad infinitum*

a cause of action against nonresident defendants renders equal protection of the laws meaningless to the class of nonresidents compelled to defend stale litigation long after memories fade, witnesses have died or disappeared, and evidence lost. *Cf. Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).

Thus, Petitioner and others are forced to choose between the pursuit of a livelihood outside Texas and the receipt of privileges and immunities granted only to Texas residents. The full impact of the statute acts to chain citizens to a specific jurisdiction for the duration of an applicable limitations period even if no litigation is ever initiated. A whole class of potential defendants become frozen, and denied fundamental rights of mobility.

Second, although the privilege of a limitations defense has not been afforded the status of a fundamental right, the defense has become "an integral part of the legal system..." 486 U.S. at 893. In *Bendix Autolite*, this Court struck down a similar suspension statute as violative of the Commerce Clause. *Id.* at 891. Petitioner argues the reinforcing relationship between the Privileges and Immunities Clause of Article IV, §2 and the Commerce Clause of the Constitution compels the logical and reasonable extension of this Court's reasoning in *Bendix Autolite* to the facts of the case at bar.

While Texas may eliminate or restrict the defense of limitations for any rational reason, and provide a Texas plaintiff the opportunity to maintain a cause of action indefinitely against resident and nonresidents alike, she can not establish the necessity of Texas residency as the determinative factor for the receipt of judicial immunities. *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). The notion of a State which seeks to foster a system of civil justice where its resident plaintiffs are granted substantial discriminatory advantages over nonresident defendants does not promote the interests of interstate harmony, and is repugnant to the concept of national citizenship. Petitioner argues there is no

substantial state interest closely related to the discrimination at issue in this case. Accordingly, the statute violates the Privileges and Immunities clause of Article IV, §2 of the Constitution. *Toomer*, 334 U.S. at 395; *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 65 (1988).

Thus, the District Court erred when it rejected the Petitioner's Privileges and Immunities argument, and ruled that this Court's decision in *Bendix Autolite* has been limited to only those cases which involve Commerce Clause violations, citing *Robinson v. Visual Packaging, Inc.*, 705 F. Supp. 216, 219, n.4 (D.N.J. 1989). Such analysis by both District Courts misconstures this Court's reasoning in *Bendix Autolite*. Indeed, the District Court's rationale in its rejection of Petitioner's argument is that an Ohio suspension statute similar to the one at issue in the case at bar, did not violate Constitutional principles in *Vostack v. Axt*, 510 F. Supp. 217 (S.D. Ohio 1981). However, the District Court's reliance upon *Vostack* is in direct conflict with this Court's decision in *Bendix Autolite* which struck down the very suspension statute at issue in the *Vostack* case.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHARTER NAT'L BANK-WESTHEIMER
Plaintiff,

vs.

MARICHAL & ASSOCIATES, INC., *et al.*,
Defendants.

CIVIL ACTION NO. H-90-3145

MEMORANDUM AND ORDER

I.

Defendant Robert J. Musemeche has presented an oral motion to dismiss under the applicable statute of limitations. The parties agree that the suit is untimely under the general statute of limitations, but dispute whether the statute of limitations has been tolled by defendant's absence form the State of Texas. *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.004 (Vernon 1985). It is undisputed that defendant was a citizen of Texas when the transaction underlying this case was consummated, and when the cause of action occurred, and that he moved in August 1986. This lawsuit was filed on October 9, 1989, more than four years after plaintiff Charter National Bank-Westheimer's cause of action accrued on May 28, 1985. The court denies defendant's motion.

II.

Texas law tolls the statute of limitations when "[t]he absence from this state of a person against whom a cause of action may be maintained suspends the running of the applicable statute of limitations for the period of the person's absence."

Tex. Civ. Prac. & Rem. Code § 16.063 (Vernon 1985). Texas authority establishes that the tolling provision of the statute applies here. In *Dicker v. Binkley*, 555 S.W.2d 495, 497 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.), the court stated:

> In *Stone v. Phillips*, 142 Tex. 216, 176 S.W.2d 932, 934 (1944), our supreme court held that while article 5537 is generally inapplicable to nonresidents, it does apply to nonresidents who were domiciled in the state at the time the cause of action accrued. Under *Stone*, the running of the statute of limitations against the claim is suspended even after the domiciliary leaves the state, *even though he is not actually in the state when the cause of action becomes a present, enforceable demand in the sense that the obligation has matured for suit.*

See also, Wise v. Anderson, 163 Tex. 359 S.W.2d 876, 879 (1962), holding that tolling provision "does apply to nonresidents who were present in the state at the time the cause of action accrued...." Defendant admits that he was domiciled in Texas when the cause of action accrued on May 28, 1985. (Def. Trial Memo, p. 1,2).

Defendant raised three arguments to resist the application of this statutory provision: (1) the statute is not consonant with its original purposes; (2) the statute violates constitutional equal protection; (3) the statute violates constitutional privileges and immunities protection. Each of these arguments fail.

The statutory section was originally developed to protect domestic creditors against losses occasioned by debtors who were absent from the state. *Ayers v. Henderson*, 9 Tex. 539, 541 (1853); Harris v. *Columbia Broadcasting System, Inc.*, 405 S.W.2d 613, 617 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.). However, courts have held that the increasing ease with which out-of-state defendants can be brought into Texas courts by the long-arm statute does not change the scope of the statute.

in *Vaughn v. Deitz*, 430 S.W.2d 487, 489-90 (Tex. 1968), the court stated that: "The precise question has not been decided in Texas, but at least two courts have concluded from our treatment of related problems that Article 5537 [,the precursor to § 16.063,] applies even in cases where an alternative method of personal service is available ... We agree." *See also*, *Stone v. Phillips*, 142 Tex. 216, 176 S.W.2d 932, 934 (1944); *Hart v. Winsett*, 171 S.W.2d 853, 855-56 (Tex. 1943); *Dicker v. Binkley*, 555 S.W.2d 495, 497 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.); *Hutchins v. Republic Supply Co.*, 295 S.W.2d 449, 451-52 (Tex. Civ. App.—Galveston 1956, writ ref'd n.r.e.). These courts have found no conflict between the general statute of limitations provision and the tolling provision. *See, e.g.*, *Hart*, 171 S.W.2d at 855-56. Defendant's argument as to the decreasing importance of the statutory provision's original purpose does not permit a finding that the statute is inapplicable here.

Defendant's equal protection argument does not justify the result he seeks. Defendant cites no case finding an equal protection violation in a similar case. The Supreme Court, in *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 409-10, 102 S.Ct. 1137, 1142 (1982), analyzed a similar argument, and stated as follows:

> When the statute is examined under the Equal Protection Clause, it survives petitioner's constitutional challenge because rational reasons support tolling the limitation period for unrepresented foreign corporations foreign corporations despite the institution of long-arm jurisdiction in New Jersey. First, the unrepresented foreign corporation remains potentially difficult to locate. Long-arm jurisdiction does not alleviate this problem, since a New Jersey must find unrepresented foreign corporation before it can be served... It is true, of course, that respondents had little or no trouble locating this well known defendant-pe-

> titioner, but the tolling provision is premised on a reasonable assumption that unrepresented foreign corporation, as a general rule, may not be so easy to find and serve.

The Supreme Court held that equal protection was not violated. This reasoning applies to the present case. The difficulty of out-of-state service provides a rational basis for the tolling statute. As the Supreme Court noted in *Cohn*, the defendant may still raise the defense of laches. 455 U.S. at 411, 102 S. Ct. at 1143. Laches also can be pled in Texas, *Clark v. Amoco Prod. Co.*, 794 F.2d 967, 971 (5th Cir. 1986); *Buzbee v. Castlewood Civic Club*, 737 S.W.2d 366, 369 (Tex. App.—Houston [14th Dist.] 1987, no writ); *Stergios v. Forest Place Homeowner's Ass'n, Inc.*, 651 S.W.2d 396, 401 (Tex. App.—Dallas 1985, writ ref'd n.r.e.), and has been pled here.

Finally, the defendant argues that the holding of *Bendix Autolite Corp. v. Midwesco Enterp.*, 486 U.S. 888, 108 S. Ct. 2218 (1988), applies to invalidate the Texas tolling statute. In *Bendix*, the Supreme Court held such a statute unconstitutional under the commerce clause. 486 U.S. at 894; 108 S. Ct. at 2222. *Bendix* has been limited to cases involving commerce clause violations. *See Robinson v. Visual Packaging, Inc.*, 705 F.Supp. 216, 219, 219 n.4 (D.N.J. 1989). Defendant admits that no commerce clause analysis applies in the present case. (Def. Trial Memo., p. 5).

Defendant asserts, without citation to authority, that application of the Texas statute would violate the privileges and immunities clause. Even assuming that *Bendix* cannot be distinguished factually from the present case, defendant provides no facts or law to support the implicit assumption that the commerce clause analysis of *Bendix* can be translated to the privileges and immunities clause. Other courts addressing this issue have rejected defendant's argument. *See The President, Directors and Company of the Chemung Canal Bank v. Good-*

win Lowery, et al., 93 U.S. 72, 76 (1876); *Vostak v. Axt*, 510 F. Supp. 217, 221 (S.D. Ohio 1981); *Dew v. Appleberry*, 23 Cal.3d 630, 636-37 (1979). In *Axt*, the court held: "The state legislature's decision to withdraw the statue of limitations protection from Ohio residents and non-residents alike, who have committed tortious injuries in Ohio and then become absent from the state, does not constitutionally infringe on one's right to travel to and, perhaps, settle in another state." 510 F. Supp. at 221. This statement squarely applies to the facts of the present case.

Therefore, this court finds that defendant's motion to dismiss must be denied.

SIGNED on February 3, 1993, at Houston, Texas.

/s/
Lee H. Rosenthal
United States District Judge

B1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHARTER NAT'L BANK-WESTHEIMER
Plaintiff,

vs.

MARICHAL & ASSOCIATES, INC., *et al.*,
Defendants.

CIVIL ACTION NO. H-90-3145

FINAL JUDGMENT

In accordance with the findings of fact and conclusions of law stated in open court on February 2, 1993, following the conclusion of the evidence and the stipulations of the parties, the court orders and adjudges that plaintiff Charter National Bank-Westheimer recover from defendant Robert J. Musemeche the following:

(a) the principal sum and prejudgment interest through February 2, 1993 in the amount of $662,036.55;

(b) prejudgment interest from February 2, 1993 through the date of this judgment at the rate of $135.12 per day;

(c) attorneys' fees of $15,000.00, together with the additional amounts of $5,000.00 if the defendant appeals this judgment to the Court of Appeals and an additional $5,000.00 if the defendant seeks a further review of this judgment by the United States Supreme Court;

Borrower:		**Marichal & Associates**			
Guarantor:		**Robert Museneche**			
		(Limited to 50% of Liability)			
Date		**Outstanding**		**#**	**Accrued**
From:	**To:**	**Balance**	**Rate**	**Days**	**Interest**
02/27/85	05/28/85	548,000.00	13.00	91	17,761.21
Post Maturity Interest					
05/29/85	12/31/85	548,000.00	18.00	217	58,643.51
01/01/86	12/13/86	548,000.00	18.00	365	98,640.00
01/01/87	12/31/87	548,000.00	18.00	365	98,640.00
01/01/88	12/31/88	548,000.00	18.00	366	98,910.25
01/01/89	12/31/89	548,000.00	18.00	365	98,640.00
01/01/90	12/31/90	548,000.00	18.00	365	98,640.00
01/01/91	12/31/91	548,000.00	18.00	365	98,640.00
01/01/92	12/31/92	548,000.00	18.00	366	98,910.25
01/01/93	02/01/93	548,000.00	18.00	32	8,647.89
Total Interest Due					776,073.10
Principal Due					548,000.00
Total Principal & Interest Due On Note					1,324,073.10
1/2 Of Total Principal & Interest					662,036.55
Per Diem Interest					
		548,000.00	18.00	1	270.25
		1/2 Of Per Diem Interest			135.12

(d) post-judgment interest at 3.45% per annum; and

(e) costs of court.

This is a FINAL JUDGMENT.

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

SIGNED on February 10, 1993, at Houston, Texas.

/s/
Lee H. Rosenthal
United States District Judge

C1

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2189

CHARTER NATIONAL BANK - WESTHEMIER,
Plaintiff-Appellee,

versus

MARICHAL and ASSOCIATES, INC., *et al.*,
Defendants,

ROBERT J. MUSEMECHE,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-90-3145)

Before WISDOM, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 47.6.

D1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2189

CHARTER NATIONAL BANK-WESTHEIMER,
Plaintiff-Appellee,

versus

MARICHAL and ASSOCIATES, INC., *et al.*,
Defendants,

ROBERT J. MUSEMECHE,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(March 3, 1994)

Before WISDOM, BARKSDALE and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

§ 16.004. Four-Year Limitation Period

(a) A person must bring suit on the following actions not later than four years after the day the cause of action accrues:

(1) specific performance of a contract for the conveyance of real property;

(2) penalty or damages on the penal clause of a bond to convey real property; or

(3) debt.

(b) A person must bring suit on the bond of an executor, administrator, or guardian not later than four years after the day of the death, resignation, removal, or discharge of the executor, administrator, or guardian.

(c) A person must bring suit against his partner for a settlement of partnership accounts, and must bring an action on an open or stated account, or on a mutual and current account concerning the trade of merchandise between merchants or their agents or factors, not later than four years after the day that the cause of action accrues. For purposes of this subsection, the cause of action accrues on the day that the dealings in which the parties were interested together cease.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1., 1985.

RULE 108. DEFENDANT WITHOUT STATE

Where the defendant is absent from the State, or is a nonresident of the State, the form of notice to such defendant of the institution of the suit shall be the same as prescribed for citation to a resident defendant; and such notice may be served by any disinterested person competent to make oath of the fact in the same manner as provided in Rule 106 hereof. The return of service in such cases shall be endorsed on or attached to the original notice, and shall be in the form provided in rule 107, and be signed and sworn to by the party making such service before some officer authorized by the laws of this State to take affidavits, under the hand and official seal of such officer. A defendant served with such notice shall be required to appear and answer in the same manner and time and under the same penalties as if he had been personally served with a citation within this State to the full extent that he may be required to appear and answer under the Constitution of the United States in an action either in rem or in personam.

(Amended July 22, 1975, eff. Jan. 1, 1976.)

(2)

Court U.S.
FILED
JUN 30 1994
OFFICE OF THE CLERK

No. 93-1925

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

ROBERT J. MUSEMECHE,
Petitioner,

v.

CHARTER NATIONAL BANK-WESTHEIMER,
Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES I. SMITH, JR.
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11pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a Texas statute that suspends the running of the applicable statute of limitations during a defendant's absence from the State of Texas denies equal protection to a defendant who is a non-resident of Texas, despite the decision in *G. D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982).

2. Whether a Texas statute that suspends the running of the applicable statute of limitations during a defendant's absence from the State of Texas violates the Privileges and Immunities Clause, despite the decision in *Chemung Canal Bank v. Lowery*, 93 U.S. 76 (1876).

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No. 93-1925

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

ROBERT J. MUSEMECHE,
Petitioner,

v.

CHARTER NATIONAL BANK-WESTHEIMER,
Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT:

Respondent Charter National Bank-Westheimer ("Charter") requests that the Petition for Writ of Certiorari be denied.

STATEMENT OF THE CASE

Charter generally agrees with the procedural history and statement of facts set forth by Petitioner with the following exceptions. First, Charter did not originally know where Mr. Musemeche could be found when he moved out of Texas. A demand letter was sent to Mr. Musemeche at his Texas address in 1985. Tr. 2 at 53; Plt. Ex. 11. When

Mr. Musemeche left Texas in 1986, he did not inform Charter of his new address. Tr. 2 at 80. When Charter decided to file suit, it originally could not locate Mr. Musemeche and had to take additional efforts to find him. Tr. 2 at 24-25.

Second, the parties stipulated that the suit was not filed until October 9, 1984, but Charter did not stipulate that the suit was filed "beyond the applicable limitations period." *See* Petition at 3. Suit was filed within the limitations period as extended by Tex. Civ. Prac. & Rem. Code § 16.063 (Vernon 1986).

Third, Mr. Musemeche asserted a defense of laches at trial based upon the fact that the suit was not filed until October of 1989. This defense was rejected by the trial court and that ruling was affirmed by the Fifth Circuit Court of Appeals.

ARGUMENT

A. Summary of Argument

The constitutional challenges asserted by Petitioner have been rejected by prior decisions of this Court and other courts. Tolling statutes bear a rational relationship to a legitimate state objective and do not violate the Equal Protection Clause. *G. D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982); *Vaughn v. Deitz*, 430 S.W.2d 47 (Tex. 1968). For the same reasons, such statutes do not violate the Privileges and Immunities Clause. *Chemung Canal Bank v. Lowery*, 93 U.S. 76 (1876); *Vostack v. Axt*, 510 F. Supp. 217 (S.D. Ohio 1981). Mr. Musemeche did not raise a Commerce Clause challenge to the Texas statute in the trial court or in the court of appeals, so his reliance upon Commerce Clause cases in support of his other constitutional challenges is misplaced.

B. Reasons For Denying The Writ

1. The Texas Tolling Statute Does Not Deny Equal Protection

In *G. D. Searle & Co. v. Cohn*, 454 U.S. 404 (1982), this Court held that a New Jersey tolling statute substantially similar to the Texas statute at issue in this case did not deny equal protection of the law. This Court recognized that tolling statutes are based on a "reasonable assumption" that, as a general rule, a defendant who is not located in the forum state may not be as easy to find or serve as a defendant who can be found in the forum state. 454 U.S. at 410. The Texas Supreme Court rejected an equal protection challenge to the Texas tolling statute in *Vaughn v. Deitz*, 430 S.W.2d 47 (1986).[1] In *Vaughn*, the Texas Supreme Court recognized that "[a]bsence from the state is not an unreasonable or arbitrary basis of classification where the statutes of limitations are concerned" because "distance is one of the factors that may make it more difficult and expensive to obtain" the information necessary to obtain service on an out-of-state defendant. 430 S.W.2d 490.

Further, Petitioner's entire argument is premised on a basic misunderstanding of § 16.063. Petitioner bases his challenge on his allegation that the Texas tolling statute applies to "nonresidents only." Petition at 6. However, the Texas statute tolls limitations based on the "absence from [Texas] of a person against whom a cause of action may be obtained." Therefore, by its express terms, the Texas statute applies equally to residents and nonresidents.

---

[1] The *Vaughn* decision dealt with Tex. Rev. Civ. Stat. Ann. art. 5537, which is now codified as Tex. Civ. Prac. & Rem. Code § 16.063.

Petitioner makes the unsupported argument that the evolution of minimum contacts analysis under the Due Process Clause has made all tolling statutes "void as moot." Petition at 6. This is nothing more than an attack on the social policies underlying tolling statutes, which is an argument that is properly a matter of legislative debate, not judicial decision. Petitioner's only authority for his mootness argument is the decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). However, in *Searle* (decided thirty-seven years after *Int'l Shoe*), this Court held that tolling statutes retained a rational relationship to a legitimate state objective despite improvements in substituted service and broader concepts of *in personam* jurisdiction. 455 U.S. at 409-412. *See also Vaughn*, 430 S.W.2d at 488, 490 (availability of substituted service of process does not deprive tolling statute of rational basis).

Finally, Petitioner relies heavily on the decision in *Bendix Autolite Co. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988). *Bendix* involved a Commerce Clause challenge to an Ohio tolling statute, but Petitioner has never attacked the Texas tolling statute on Commerce Clause grounds. *Bendix* itself reaffirmed the equal protection holding in *Searle*. 486 U.S. at 893, 894. Moveover, the Ohio statute struck down in *Bendix* on the basis of the Commerce Clause did not merely toll limitations but also required an out-of-state corporation to designate an agent for service of process in Ohio in order to gain the protections of the statute of limitations. The designation of an agent operated as a consent to the general jurisdiction of the Ohio courts over any claim involving the corporation, including "matters to which Ohio's tenuous relation would not otherwise extend." 486 U.S. at 893. This forced submission to general jurisdiction was held to be a "significant" burden on interstate commerce that invalidated

the entire statute. 486 U.S. at 891. The Texas tolling statute has no comparable provision.

2. The Texas Tolling Statute Does Not Violate the Privileges And Immunities Clause.

The claim by Petitioner that tolling statutes such as § 16.063 violate the Privileges and Immunities Clause[2] has been rejected for more than 100 years. *Chemung Canal Bank v. Lowery*, 93 U.S. 76, 23 L. Ed. 806 (1876). *See also Vostack v. Axt*, 510 F. Supp. 217, 221-223 (S.D. Ohio 1981); *Commonwealth of Pennsylvania v. Lightman*, 489 A.2d 200 (Pa. 1985), *cert. denied*, 475 U.S. 1095 (1986); *Dew v. Applebury*, 153 Cal.Rptr. 219, 222-224 (Calif. 1979)(in bank).

Moreover, the Texas tolling statute treats Texas residents and non-residents equally. The statute applies to any person absent from Texas against whom a cause of action may be maintained, whether he is a resident or not. The Texas tolling statute is premised on the same legislative determination that has been recognized in all of the cases holding that tolling statutes do not violate the Privileges and Immunities Clause: it may be more difficult to serve defendants who cannot be found in the forum state even when substituted service is available, and this distinction is sufficient to allow tolling statutes to satisfy constitutional requirements.

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[2] Petitioner's argument is couched in terms of a right to travel. The Fourteenth Amendment Privileges and Immunities Clause does not create an independent right of travel. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77-78, 21 L. Ed. 394 (1870); *Lutz v. City of York*, 899 F.2d 255, 263-64 (3rd Cir. 1990). The right to travel therefore must arise from the Privileges and Immunities Clause of article IV, § 2.

CONCLUSION

The Petition for Writ of Certiorari presents no issues worthy of review by this Court. The decisions in *Searle* and *Vaughn* have resolved Petitioner's equal protection challenge to the Texas tolling statute, and the decision in *Chemung Canal Bank* has foreclosed his privileges and immunities challenge. Petitioner has never raised a Commerce Clause challenge to the Texas tolling statute. The Petition for Writ of Certiorari should be denied and Respondent should be granted such other and further relief to which it is justly entitled.

Respectfully submitted,

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